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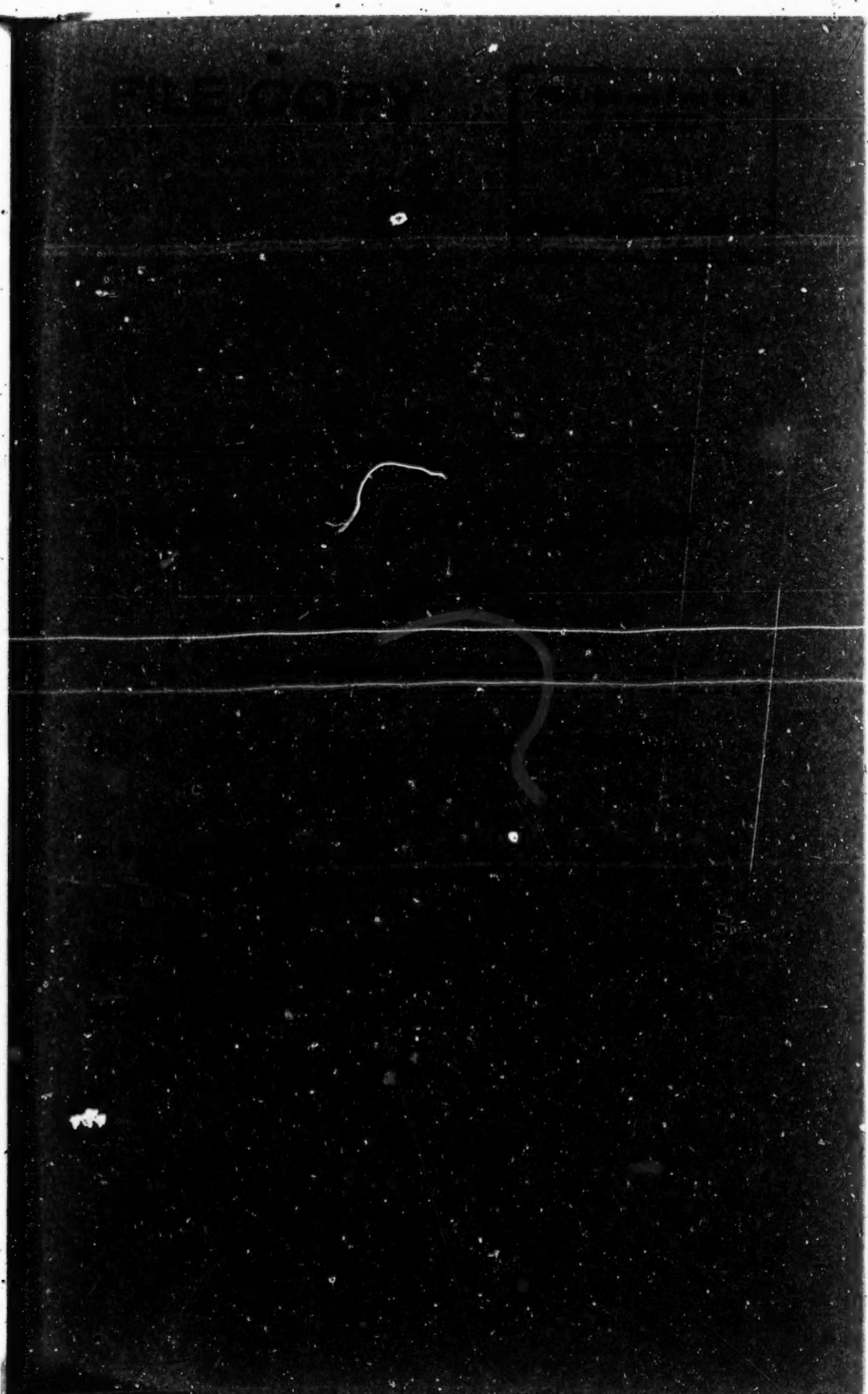

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 253

EUGENE HIGGINS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

This memorandum is submitted in response to the request made by Mr. Justice Stone in the course of the argument of this case.

Mr. Justice Stone inquired whether there is any inconsistency in allowing deductions on account of real-estate expenses as incurred in "trade or business," on the one hand, and in requiring that the capital gains and losses provisions be applicable to any sales of such real estate, on the other hand.

We believe that there is no inconsistency, because the capital gains and losses provisions may be applicable even to sales of property held in connection with one's trade or business. Section 101

(c) (8) of the Revenue Act of 1932, the revenue act involved herein, defines capital assets as follows:

> (8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. * * *

The parenthetical clause in the foregoing provisions makes it clear that even though real estate is treated as "business" property it may nevertheless be subject to the statutory restrictions with respect to capital losses and enjoy the tax advantages to be derived from capital gains.[1] Only

[1] The capital gains and losses provisions in the revenue acts, since 1921, have contained the same parenthetical clause. See Sec. 206 (a) (6) of the Revenue Act of 1921; Sec. 208 (a) (8) of the Revenue Acts of 1924 and 1926; Sec. 101 (c) (8) of the Revenue Acts of 1928 and 1932; Sec. 117 (b) of the Revenue Acts of 1934 and 1936; and Sec. 117 (a) (1) of the Revenue Act of 1938 and of the Internal Revenue Code. However, there appeared in the 1938 Act for the first time the further provision that there was to be excluded from the definition of capital assets "property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (l)." Sec. 117 (a) (1). Under these provisions, it would seem that a "business" building (since it is depreciable under Section 23 (e)) would not be subject to the capital gains and losses provisions, whereas the land would be subject to those provisions. See Article 23 (e)–1 of Regulations 101; Section 19.23 (e)–1 of Regulations 103.

stock in trade, etc., is excluded from the capital gains and losses provisions. And, plainly, petitioner's real estate, so far as this record discloses, could not qualify as such.

Accordingly, we believe that there is no inconsistency between the allowance of expenses with respect to such real estate and the applicability of the capital gains and losses provisions upon the sales of such real estate.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

JANUARY 1941.

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